IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 75

FEDERAL TRADE COMMISSION,
Petitioner,

versus

MOTION PICTURE ADVERTISING SERVICE COMPANY, INC.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF ON BEHALF OF MOTION PICTURE ADVERTISING SERVICE COMPANY, INC.

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A writ of certiorari was issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on February 21, 1952.

OPINION BELOW

The opinion of the Court of Appeals (R.[1] 81) is reported at 194 F. 2d 633.

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[1] We shall use the designation "R." in referring to the first volume of the record. References to the second and third volumes of the record will be designated, respectively, "R. vol. II" and "R. vol. III".

JURISDICTION

The jurisdiction of this Court is conferred by 28 U.S.C. 1254 (1).

I.

STATEMENT OF THE CASE

This is a proceeding under Section 5 (a) of the Federal Trade Commission Act 38 Stat. 717, 719; 52 Stat. 111; 15 U.S.C. 45, wherein the Commission issued its complaint on May 26, 1947 against Motion Picture Advertising Service Company, Inc. (hereinafter referred to as "M.P.A."), which, in substance, charges M.P.A. with engaging in unfair methods of competition in commerce by entering into exclusive screening agreements for periods of one to five years with various motion picture exhibitors, the tendency or effect of which is to unduly restrain competition in interstate commerce, and to monopolize the distribution of commercial or advertising films in such commerce. (R. 7-10)

Section 5 (a) of the Federal Trade Commission Act provides in part:

> "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> "The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

M.P.A. answered the complaint alleging as a first defense that the sole issue presented is "*res judicata*" on the ground that the same issue between the same parties was presented and decided in favor of M.P.A. in

the matter entitled: *"Screen Broadcast Corporation, et al."* 36 F.T.C. 957-962; that after a full and complete hearing upon this issue, the Federal Trade Commission rendered a decision in which it refused to order M.P.A. (and the other respondents therein named) to cease and desist from entering into **individual** contracts with motion picture exhibitors for the exclusive privilege of exhibiting commercial or advertising motion picture films in the theatre or theatres owned or controlled by the said exhibitor. Since the only issue involved in this present complaint has been fully and finally determined in M.P.A.'s favor in proceedings under the former complaint, said issue is *"res judicata"* and, accordingly, this complaint should be dismissed. (R. 10-11)

As a second defense in its answer, M.P.A. denied that its exclusive theatre screening agreements have a tendency or effect to unduly restrain, lessen, suppress and injure competition in the interstate sale, lease, rental and distribution of commercial and advertising films, or to monopolize the distribution of commercial or advertising films in such commerce, and specially denied that its acts or practices constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act. (R. 11-13)

The plea of *"res judicata"* was overruled by the Commission and the case thereupon tried on its merits. (R. 14-16)

Testimony and other evidence were introduced by the Commission and M.P.A. before a Trial Examiner of the Commission, who rendered a recommended decision and order on May 31, 1949, the substance of which was that exclusive screening agreements for a limited period of

one year do not constitute an undue restraint upon competition, but that those in excess of one year would have a tendency to unduly restrain competition. (R. 38-55)

The Trial Examiner recommended that the Commission issue a cease and desist order prohibiting M.P.A. from entering into exclusive screening agreements with theatres for a term in excess of one year. (R. 55)

The Commission, with one dissent, rendered a decision on October 17, 1950, adopting in substance the findings of fact of the Trial Examiner and his recommended order. (R. 56-64)

The United States Court of Appeals for the Fifth Circuit on February 21, 1952 unanimously reversed the decision of the Commission, set aside the cease and desist order, and dismissed the complaint. (194 F. 2d 633)

At the same time that the Commission issued its complaint in this matter, it also issued three separate complaints against Ray-Bell Films, Inc., Alexander Film Company, and United Film Ad Service, Inc., three corporations engaged in the same business as M.P.A., charging them individually with the same alleged violations of Section 5 (a) of the Federal Trade Commission Act.

There is no charge of any combination or conspiracy among the four companies or between any of them to restrain trade, and it is conceded by the Commission that there is, and always has been, free, open, active and substantial competition among all distributors, in the securing of theatre screening agreements.

The cases were tried together under a stipulation that any evidence introduced by the respondent com-

panies should apply to all four of them and could be used by any one of them. The Commission introduced separate testimony against each of the four respondent companies, although in some instances where stipulated in the record, the testimony of certain particular witnesses was introduced against all four of the companies without the necessity of having the witness repeat his testimony.

II.

THE FACTS

The material facts of the case are not disputed and are shown by (a) the testimony and exhibits; (b) the findings of fact in the recommended decision of the Trial Examiner; (c) the findings of fact in the decision of the Federal Trade Commission; and (d) the opinion of the Court of Appeals. They are as follows:

1. M.P.A. is a corporation which was organized under the laws of the State of Louisiana in September, 1921, with its office and principal place of business in New Orleans, Louisiana.

2. From September, 1921 to June, 1925, M.P.A. acted as a distributor of advertising films. In June, 1925, M.P.A. organized its own studio and became a producer of films and, since that time, has been engaged in the business of producing, selling, leasing and distributing motion picture advertising films to, or on the order of, advertisers and other distributors of motion picture advertising films, and of furnishing display service by causing the exhibition of such films in theatres under screening agreements between M.P.A. and the theatre owners.

3. Before the advent of motion picture advertising, theatres exhibited advertising on "drop curtains" which

were lowered between performances or between acts. On these curtains were painted advertisements which produced a supplementary source of income to the theatres, the privilege of placing advertisements thereon being leased to some one sign company or painter. Advertising on theatre screens has developed from the original use of slides to black and white short films without life action or animation or sound, seasonal films, short life action films, reader type or tintype pictures, to present standard practice, which consists of the exhibition of 35 mm (millimeter) life action or cartoon animation (or a combination of both) in black and white, or color, with sound accompaniment.

4. There are in the United States at least 28 producers and distributors of 35 mm. film advertising playlets and at least 265 producers (who are not distributors) of 35 mm. film advertising playlets.

5. The motion picture advertising business is divided into three categories, namely, local advertising, manufacture-dealer or cooperative advertising, and national advertising.

6. Local advertising consists of the exhibition of films for local merchants in local theatres, and the films used for this purpose are known as "library films."

7. Manufacturer-dealer or cooperative advertising is national or regional in scope and consists of playlets produced in accordance with the manufacturer's specifications. The cost of production of the playlets, including the master film or negative, and the prints are borne by the manufacturer; and the cost of exhibiting the films is usually borne by the manufacturer or is shared by the manufacturer and his dealers, the manufacturer's dis-

tribtuors (middlemen between the manufacturer and his dealers) also sometimes sharing in distribution costs.

8. National advertising is national or regional in scope and consists of playlets produced in accordance with the manufacturer's specifications, the cost of production and exhibition of which are borne exclusively by the manufacturer.

9. Library films for local advertising consist of a series of playlets advertising various lines of business. M.P.A. carries in its library a stock of films that advertise forty lines of business. These library films provide the local advertiser with ready-made motion pictures for the advertising of his particular business. Since these films are not specialized for any particular advertiser, they are personalized by the addition of a name trailer which identifies the advertiser with the line of business advertised by the playlets. Library film is a playlet 40 feet in length, in black and white or color, with life action or cartoon animation (or a combination of both) and sound accompaniment. The name trailer is 20 feet in length and the overall length of the film is 60 feet, the screening time of which is 40 seconds. Within the territory in which M.P.A. operates, its sales force regularly calls upon local advertising customers and offers to them its library film advertising service. M.P.A.'s contracts with local advertisers call for the display of particular library films on designated theatre screens under contract with M.P.A., usually on a weekly or alternate weekly basis for a period of one year but in no instance for less than thirteen weeks.

10. Specially produced films for manufacturer-dealer or cooperative advertising programs advertise

merchandise, products and service of a national manufacturer. They are playlets 40 feet in length, in black and white or color, with life action or cartoon animation (or a combination of both) and sound accompaniment; and to the playlet is added a 20-foot trailer depicting, among other things, the name of the dealer who is identified with the advertising message in his particular trade area. The overall length of the film is 60 feet and the screening time is 40 seconds. These specialized films and playlets may or may not be produced by M.P.A. Customarily, the manufacturer deals with one distributor in arranging for the initiation and execution of the advertising campaign, but not always. Usually, the distributor selected by the manufacturer is not alone able to provide the advertiser with the full coverage that he desires. Accordingly, the originating distributor who has the contract with the manufacturer enlists the aid of other distributors who have available theatre outlets. Through rate books, or other sources of information, the originating distributor knows of the theatres available throughout the territory to be blanketed by the advertising program, and of the theatre screening rates, and knows further that a fair average of such other theatres will be prepared to exhibit the playlets. When the originating distributor has in hand the required information respecting the coverage that he can assure and of the overall costs of exhibition, he reports to the manufacturer or advertising agency, receives approval, and proceeds to execute the program. The originating distributor's salesmen and the salesmen for the co-distributors sell the program to the advertiser's dealers for use in the theatres where the respective distributors have screening rights, and in due course the program is launched in this widespread territory. The number of dealers may be as many as 5,000, and a substantial por-

tion of the dollar volume of the motion picture advertising business is executed through these manufacturer-dealer or cooperative programs.

11. Specially produced films for national advertising are playlets that advertise the merchandise, products and service of a national manufacturer that may be handled by numerous retailers in a given trade territory, and hence it is impracticable for the retailer to participate in the distribution costs. Usually, the playlets do not carry any dealers' name trailers. The playlets are 90 feet in length (minute movies), but may run to 120 or 130 feet, are in black and white or color, with life action or cartoon animation (or a combination of both) and sound accompaniment. M.P.A. is a distributor of this type of advertising through the theatres which it has under contract, and the national advertiser or its advertising agency has available a list of theatres under contract with M.P.A. and a schedule of M.P.A.'s screening rates. Most of the advertising playlets are produced by concerns other than M.P.A.

12. The film libraries represent substantial investments. The annual cost of library production of M.P.A. runs to more than $300,000.00. The libraries are kept current to changes of style and these recurrent outlays run into substantial sums. The cost of manufacturer-dealer playlets for a year's display runs to several thousand dollars.

13. Theatre screening agreements made between M.P.A. and various theatres are divided into two general classes: non-exclusive contracts and exclusive contracts. Under a non-exclusive contract the screen is open to more than one distributor at the same time; whereas, under

an exclusive contract, only one distributor is permitted to show advertising on the theatre screen during the term of the contract (except that the theatre will generally run out to competition advertising contracts of other distributors which have been sold to the advertiser previous to the expiration of the exclusive contract). **M.P.A. in common with other film advertising distributors has, from the very beginning of the industry, solicited and obtained exclusive theatre screening agreements for reasonable periods of time, the term ranging from one to a maximum of five years.**

Under a non-exclusive screening agreement the theatre is paid by the distributor only for advertising films actually sold and exhibited, whereas, under an exclusive screening agreement the distributor may, and often does, pay the theatre a consideration (flat guarantee), irrespective of whether any advertising films are sold and exhibited, or pays a theatre in advance (advance guarantee) against rentals to be earned under the contract.

14. Motion picture advertising distributors must have a nucleus of exclusive screening agreements with theatres in order (a) to sell to local advertisers its library film service; (b) to sell manufacturer-dealer or cooperative programs; and (c) to sell national advertising programs.

15. M.P.A. must have a fairly representative number of assured theatre outlets to justify its large investments in libraries of films, in the large periodical outlays for keeping its library films current, and in the large costs represented by its productive and promotional organization. It must assure screening space for its customers and to that end must have a nucleus of theatre

outlets for service where and when required, time often being very much of the essence.

The business of a motion picture advertising distributor is the sale of an advertising service, which consists of a suitable advertising film, together with an acceptable place in which to display the film. A motion picture advertising distributor could not sell the film of an advertiser unless the distributor could assure the advertiser of the availability of the place in which the film would be displayed, any more than a bill poster company could sell an advertising poster without offering a billboard for the display of the poster. A film ad distributor could not afford to have any substantial investment in films unless he was assured of available theatre screening space for reasonable periods of time. Furthermore, since theatre screening space is severely limited, it is impractical for more than one distributor to exhibit films at the same time, and this is another compelling reason for the necessity of exclusive screening agreements.

16. Because of prohibitive costs it is not economically advantageous for a local merchant to have a special playlet made for his individual use.

17. A film ad distributor cannot run the risk inherent in a guaranty of minimum revenue to the theatre owner without securing a compensating right of availability of theatre screens.

18. Film advertising contracts should run for at least a year to produce the desired cumulative advertising impressions. A year's advertising contract has thus become standard practice. While actual exhibitions of an advertiser's program may be on a weekly basis, biweekly showings are common, although exhibitions every

third or fourth week are not uncommon. Advertising contracts limited to 13 weeks are becoming something of a rarity, a "teaspoon taste". And in order for the advertising campaign to be effective there is generally a follow-up campaign after the expiration of the first year's advertising contract, thus requiring the use of the theatre screen for more than one year.

19. Between the taking of an advertising contract, particularly a manufacturer-dealer or cooperative contract, and the beginning of the screening of the advertising, several months must elapse for the production and approval of the advertising film, the solicitation of dealers and the allocation and coordination of screen time.

20. It is standard practice to allow a distributor to continue to exhibit its advertising (which has been sold to the advertiser prior to the expiration of its theatre screening agreement) after the expiration of the old theatre contract, and thus its successor finds that only a fraction of the screen space for which it has contracted will be available for several months after the new contract term commences. A screen is not fully available until fourteen to fifteen months after the commencement of the contract. On a library service, it takes about sixty days to get the local advertiser's contract started. Moreover, many types of advertising, especially of national advertising (including manufacturer-dealer programs) are not screened until after the lapse of several months succeeding the making of the advertising agreements. In these cases, it takes six months to produce the special film and to contact dealers of the manufacturer.

Advertising contracts are generally made for a

period of thirteen weeks to one year, and frequently advertisers enter into follow-up campaigns to commence at the end of the first year. Accordingly, unless the distributor has available screening space for a period of more than one year he would be in the anomalous position of being able to secure a contract from his advertiser for the first year, but being unable to accept a re-order for the follow-up advertising campaign.

21. M.P.A. has two general types of theatre screening contracts, shown in the record as Commission's Exhibits 21 and 22. The forms of contract contain the exclusive clause and contain the words "five years" as to the term of the contract; but in cases where the contract is non-exclusive, the exclusive clause is deleted, and in cases where the term is less than five years, the word "five" is stricken and the appropriate word is inserted in its place.

22. In January of 1925 M.P.A. had theatre screening agreements with 300 theatres in the States of Mississippi, Louisiana and a part of Alabama. In January of 1945 M.P.A. had theatre screening agreements with 3,000 theatres in twenty-eight states, and between January, 1945 and the Summer of 1948, M.P.A. obtained theatre screening agreements with an additional 1500 theatres, despite the vast amount of competition from competitors. During 1948 contracts with more than 3,000 theatres expired. An average of about one-third of the theatre screening agreements expire each year.

23. There were approximately 20,306 theatres in the United States on August 1, 1947, and about 12,676 exhibited film advertising. At that time M.P.A. had agreements with 4,096, of which 2,493 contained the exclusive clause. The terms of 1,387 of these agreements

run for less than five years and the terms of the other 1106 run for five years. **No agreement runs longer than five years.**

24. **There is free, open, active and substantial competition among film advertising distributors for the securing of theatre screening agreements. Theatres frequently change distributors at the termination of contracts. There is also free, open, active and substantial competition in the acquisition of advertising contracts and in the production of advertising films.**

25. M.P.A., in line with common practice, makes its creens available to competing film distributors; provided, however, that the screens shall not be loaded beyond the extent permitted by the theatres, that the films shall be of standard length, and that the quality of films shall meet the standards of the theatres. In such instances M.P.A. pays a standard American Association of Advertising Agencies' commission of 15% plus 2% cash discount.

26. Screening space is severely limited. Thus, out of some 20,306 motion picture theatres in the United States, about 40 per cent do not accept film ads. Motion picture shows commonly are limited to two per day, with a possible matinee on Sunday, and the shows run for two to two and a half hours. Theatre patrons, potential customers of the advertisers, who pay admission for entertainment, resent the showing of too much film advertising, and thus impose natural limitations on the number of ads that may be run by theatres, the number varying from three to six ads, or an overall of two, three or four minutes, or, from two per cent to four per cent of the time consumed by each show. In this respect motion picture advertising differs radically from news-

paper and magazine advertising, which is limited only by the availability of newsprint and normally occupies some 60 per cent of the overall newspaper or magazine space, and differs materially from radio advertising, which may allow 20 per cent of radio time for commercials.

27. Film advertising affords the theatre owner a desirable source of extra revenue, and furnishes advertisers a highly effective medium for the promotion and sale of their products and services.

28. **Owners of many theatres insist upon limiting theatre screen advertising to one distributor at a time, and insist that the contract run for more than one year.**

29. Many theatres enter into exclusive screening agreements with film advertising distributors for the following reasons:

(a) To afford better control of theatre screens as respects audience acceptance, and as respects confusion, chaos and revenue loss from a screen overload one week, and a screen underload the next week.

(b) To prevent misunderstandings with advertisers.

(c) To enhance screen rentals.

(d) To eliminate complicated bookkeeping procedure.

(e) To enable theatre owners to control film advertising through reliable distributors who will give efficient service and promptly pay their bills.

(f) To enable theatre owners to control the quality of the advertising films shown on their screens.

(g) To enable theatre owners to insist upon minimum guarantees.

30. The quality of advertising films is a very important competitive factor in the film advertising business.

31. M.P.A.'s competitors who testified on behalf of the Commission have lost out in competition, not because of the existence of exclusive theatre screening agreements, but because of their refusal to offer to pay as much as M.P.A. for theatre screen privileges, the inferior quality and character of their films, their lack of sales organization, and their failure to pay the theatres in accordance with their contracts.

32. All competitors of M.P.A. have entered into exclusive theatre screening agreements for terms of one to five years from the beginning of the industry, more than thirty years ago.

33. Many theatre owners would rather forego the supplementary source of income derived from screen advertising if required to exhibit films for more than one distributor at the same time, or, if required to limit the contract to one year.

34. National advertisers and their advertising agents could not use the medium of screen advertising unless they were assured of space for periods of more than one year for the display of their special films manufactured at considerable cost to the manufacturer.

35. No film advertising distributor has ever succeeded in business without exclusive theatre screening agreements.

The facts establish the following conclusions:

1. That M.P.A., in common with all other film advertising distributors, has, from the very beginning of the industry, more than thirty years ago, solicited and obtained exclusive theatre screening agreements for reasonable periods of time;

2. That the solicitation and acquisition of theatre screening agreements by M.P.A. have been in open and free competition with all competitors;

3. That unless the motion picture advertising business is to be outlawed in its essential functions, the acquisition of exclusive theatre screening agreements is necessary because

(a) Advertisers, whether they be local, national, or regional, must be definitely assured of screen space and time for the distribution and exhibition of their advertising films.

(b) Local advertising will disappear unless distributors can furnish syndicated service through the production of library film.

(c) Film advertising distributors cannot afford the large investments necessary to produce library film and for the renewals and upkeep thereof, and for the necessary organizational and promotional setups, unless they are assured of a market for their products through exclusive theatre screening agreements.

(d) Distributors cannot afford to yield to the importunities of theatre owners as respects minimum guaranteed revenue without a compensating assurance of exclusive screening rights.

(e) Non-exclusive theatres whose screens are open to all distributors tend to become chaotic in respect to the film advertising business, since

unlimited access to their screen results in too few or too many advertisements at each performance; in the display of competitive advertisements at the same performance, to the disaffection of advertisers, the annoyance of theatre patrons, and the chagrin of theatre owners; and in the general loss of control of the business by the theatre owners, and of the revenue accruing therefrom.

4. That the terms of M.P.A.'s theatre screening agreements are not longer than business necessity dictates for the execution of effective advertising programs;

5. That M.P.A., acting independently of its competitors, has undertaken to negotiate theatre screening agreements with theatre owners in the ordinary course of business without deception, misrepresentation, or oppression, at fair prices, and in open and free competition;

6. That exclusive theatre screening agreements for periods of one to five years do not unduly restrain, lessen, suppress, or injure competition;

7. That exclusive theatre screening agreements for periods of one to five years have not hindered or prevented competition in the selling, leasing and distributing of commercial or advertising films in commerce, and have not resulted in creating in M.P.A. a monopoly, and have not a dangerous tendency to create in M.P.A. a monopoly;

8. That the soliciting and obtaining of exclusive theatre screening agreements for periods of one to five years do not constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act; and

9. That the prevention of the use of exclusive theatre screening agreements for periods of one to five years is not in the interest of the public.

III.

SUMMARY OF ARGUMENT

1. The words "unfair method of competition" are not defined by the Federal Trade Commission Act, and it is for the courts, not the Commission, ultimately to determine as a matter of law what they include. Each case must be determined on its own facts. And this rule is not avoided by the Commission's stating as a finding of fact what is a mere conclusion of law.

2. Exclusive theatre screening agreements for a duration of one to a maximum of five years, which are necessary in the operation of the business, which do not unduly suppress competition and which do not have a tendency to create in M.P.A. a monopoly, do not constitute unfair methods of competition in commerce and are not unlawful under Section 5 (a) of the Federal Trade Commission Act.

3. Theatre screening agreements are contracts of agency and are subject to the principle decided in the case of *Federal Trade Commission v. Curtis Publishing Co.*, 260 U.S. 568, in which this Court held that the appointment by the principal of exclusive agents does not constitute an unfair method of competition under Section 5 (a) of the Federal Trade Commission Act, and does not come within the bann of Section 3 of the Clayton Act.

4. The complaint of the Commission should be dismissed on the ground that the sole issue now raised has been adjudicated in favor of M.P.A. in a former complaint brought by the Commission in the matter of *"Screen Broadcast Corporation, et al."*, Docket No. 4736; 36 F.T.C. 957.

IV.

ARGUMENT

The Merits

The sole issue presented on the merits is whether the individual soliciting and obtaining by M.P.A. of exclusive theatre screening agreements from theatre exhibitors for periods ranging from one to a maximum of five years constitute an unfair method of competition in commerce within the intent and meaning of Section 5 (a) of the Federal Trade Commission Act, and, as such, whether the prevention of such method is in the interest of the public, in that it (a) unduly restrains competition; or (b) has created, or tends to create, in M.P.A. a monopoly.

There is no charge in the complaint of any combination or conspiracy. The sole charge is that M.P.A. has been guilty of an unfair method of competition.

The words "unfair method of competition" are not defined by the Federal Trade Commission Act, and it is for the courts, not the Commission, ultimately to determine as a matter of law what they include. Each case must be determined on its own facts, and this rule is not avoided by the Commission's stating as a finding of fact what is a mere conclusion of law.

In *Federal Trade Commission v. Gratz*, 253 U.S. 421, 427, this Court said:

> "The words 'unfair method of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not for the Commission, ultimately to determine as a matter of law what they include. **They are clearly**

> **inapplicable to practices never heretofore regarded as opposed to good morals * * * or as against public policy** because of their dangerous tendency unduly to hinder competition or create monopoly. **The Act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade."** (Emphasis supplied)

and at page 428 the Court said:

> "If real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business methods must be preserved."

As Mr. Justice Brandeis said in *Board of Trade v. United States*, 246 U.S. 231, 238, 239:

> "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences. The District Court erred, therefore, in striking from the answer allegations concerning the history and purpose of the Call rule and in later excluding evidence on that sub-

> ject. But the evidence admitted makes it clear that the rule was a reasonable regulation of business consistent with the provisions of the Anti-Trust Law."

In *Northern Pigment Co.*, 71 Fed. 2d 574, the Court of Customs and Patent Appeals said:

> "Each case of unfair competition must be determined upon its own facts owing to the multifarious means by which it is sought to effectuate such schemes. *Federal Tr. Com. v. Beechnut Co.*, 257 U.S. 441, 453, 42 S. Ct. 150, 66 L. Ed. 307, 19 A.L.R. 882."

In *Sugar Institute v. United States*, 297 U.S. 553, 600, Chief Justice Hughes said:

> "We have said that the Sherman Act, as a charter of freedom, has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions. Thus in applying its broad prohibitions, each case demands a close scrutiny of its own facts. Questions of reasonableness are necessarily questions of relation and degree."

And, in *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360, 361, the Chief Justice used the following language:

> "The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness. They call for vigilance in the detection and frustration of all efforts unduly to restain the free course of interstate commerce, but they do not seek to establish a mere delusive liberty either by making impossible the normal and fair expansion of that commerce or the adoption of reasonable measures to protect it from injurious and destructive prac-

tices and to promote competition upon a sound basis.

* * * * * *

"In applying this test, a close and objective scrutiny of particular conditions and purposes is necessary in each case. Realities must dominate the judgment. The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it.

* * * * * *

"It is therefore necessary in this instance to consider the economic conditions peculiar to the coal industry, the practices which have obtained, the nature of defendant's plan of making sales, the reasons which led to its adoption, and the probable consequences of the carrying out of that plan in relation to market prices and other matters affecting the public interest in interstate commerce in bituminous coal."

In *Federal Trade Commission v. Paramount Famous-Lasky Corporation, et al.*, 57 F. 2d 152, the Circuit Court for the Second Circuit said at page 157:

"**The respondent is not required, under the law, to so conduct its business that every competitor may conduct his with an equal degree of success according to his size and importance. It was not the purpose of the act to equalize opportunity or insure an equal degree of success upon the part of all competitors in a given industry, but it was its purpose to preserve, for the benefit of the public, active competition therein, and where there is no question of monopoly involved, the question is whether the method of competition described has a dangerous tendency unduly to hinder competition.** *Fed. Trade Comm. v. Gratz, supra.* As the Supreme Court put it in *Fed. Trade Comm. v. Curtis Pub. Co., supra,*

'Effective competition requires that traders have large freedom of action when conducting their own affairs. Success alone does not show reprehensible methods, although it may increase or render insuperable the difficulties which rivals must face.'

"In the instant case, **there is no finding that the respondent combined with other large producers** for the purpose of hindering those outside the large combination, and the evidence would not warrant such a finding. **In the absence of combination or agreement, the fact that the method of negotiation as practiced by the respondent tends to exclude other independent producers is of itself insufficient to establish any probable tendency toward the creation of the evils prohibited by the Sherman Anti-Trust Act** (15 USCA § 1 *et seq.*). Where a practice is not inherently unlawful and unfair, and its legality depends upon its effect, a finding that it has a dangerous tendency unduly to hinder competition or create a monopoly, must be based upon its effect as demonstrated upon the experience of competitors. *Fed. Trade Comm. v. Standard Oil Co.*, 261 U.S. 463, 43 S. Ct. 450, 67 L. Ed. 746." (Emphasis supplied)

In *National Biscuit Co. v. Federal Trade Commission*, 299 F. 738, the Second Circuit Court of Appeals said:

"Whatever may be the exact meaning of the phrase 'unfair methods of competition', it is now settled that it is for the courts and not the Commission to determine as a matter of law what is and what is not included in the phrase. This ruling is not avoided by stating as a finding of fact what is a mere conclusion of law."

At page 739 the Court said:

"It was never intended by Congress that the

Trade Commission would have the duty and power to judge what is too fast a pace for merchants to proceed in business and to compel them to slow up. To do so would be to destroy all competition except that which is easy. Congress intended to eliminate all varieties of fraudulent practices from business in interstate commerce. *Sinclair Refining Co. v. Federal Trade Com.* (C.C.A.) 276 Fed. 686. 'The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain; and to this end it is essential that those who adventure their time, skill, and capital should have large freedom of action in the conduct of their own affairs,' said the Supreme Court in *Federal Trade Commission v. Sinclair Refining Co.*, 261 U.S. 463, 43 Sup. Ct. 450, 67 L. Ed. 746.

"Effective competition requires that merchants have freedom of action in conducting their own affairs. To be successful may increase or render insuperable the difficulties that rivals must face, but it does not constitute reprehensible or fraudulent methods. *Federal Trade Commission v. Curtis Pub. Co.*, 260 U.S. 568, 43 Sup. Ct. 210, 67 L. Ed. 408. The method of competition, to be condemned as unfair, should be characterized by fraud, deception or oppression. *Federal Trade Comm. v. Curtis, supra; Federal Trade Comm. v. Gratz*, 253 U.S. 421, 40 Sup. Ct. 572, 64 L. Ed. 993; *N. J. Asbestos Co. v. Federal Trade Comm.* (C.C.A.) 264 Fed. 511, 18 A.L.R. 546; *Silver Co. v. Federal Trade Comm.* (C.C.A.) 289 Fed. 985."

Whether exclusive contracts for a duration in excess of one year constitute an unfair method of competition is, therefore, a question of law to be determined by this Court, but in order to determine this issue, a scrutiny of the facts of the case should be made by the Court.

If the necessity for exclusive contracts from one to five years springs from business requirements and not from efforts to unduly restrain competition, then the contracts should be upheld as legal.

The Commission contended at the beginning of this case that all exclusive theatre screening agreements are illegal *per se*. After all the evidence was in, and it was clearly established that exclusive agreements are absolutely necessary in order to conduct a motion picture advertising business, both the Trial Examiner and the Commission held that exclusive agreements are not illegal *per se* since they do not constitute an unreasonable restraint of trade, provided the length of the agreement is not of too long duration. The cease and desist order rendered by the Commission upholds the legality of exclusive agreements, but limits their duration to one year. The Court of Appeals reversed the order of the Commission and dismissed the complaint, holding that the agreements should not be limited to a duration of one year, but should be permitted to run for periods of one to five years, as has always been the case since the inception of this industry more than thirty years ago.

Therefore, the only issue presently presented on the merits is whether exclusive agreements should be restricted to a period of one year, as decided by three of the four members of the Commission, or should be permitted to run for periods of one to five years, as decided by the dissenting member of the Commission and all three judges of the Court of Appeals.

All distributors alike from the very beginning of the industry, more than thirty years ago, have sought and obtained exclusive agreements for periods of one to five years. This method of doing business is not some new

scheme adopted by M.P.A. to stifle competition. It is abundantly established by the record that exclusive agreements for periods of one to five years are necessary for the operation of the business.

The record furthermore establishes that one-year contracts are not practical for the following reasons:

(a) Theatre screens are not fully available until fourteen or fifteen months after the inception of the contract, due to the fact that films of the predecessor distributor are generally played out to completion by the theatre;

(b) It takes many months after selling advertising to produce a film and start the screening of it in the theatre;

(c) Considerable sums are spent by the distributor in traveling and other expenses of salesmen in order to secure screening privileges, and these expenses are not justified if the screening agreement is limited to one year;

(d) A distributor could not afford to pay minimum guarantees demanded by theatres if the term is limited to one year;

(e) A distributor could not afford to spend hundreds of thousands of dollars each year to keep current "library films" unless it could be assured of screen space for more than one year in which to exhibit the films;

(f) No one would invest capital in the business of the distributor without assurance of a market for more than one year; and

(g) Finally, theatre owners themselves frequently demand guarantees for more than one year, or otherwise refuse to exhibit motion picture advertising.

Disregarding all the other points, except (a) above,

it is apparent that if the decision of the Court of Appeals is reversed and the cease and desist order of the Commission reinstated, M.P.A. and the other motion picture advertising distributors will find themselves in this position:

A one-year exclusive contract with a theatre will be made and the theatre screen will not be fully available until 14 or 15 months after the inception of the contract, due to the fact that films of the predecessor distributor will be played out to completion by the theatre. At that time, the contract will be at an end, and the only right of the distributor will be to have the theatre play out to completion the advertising contracts which it has sold within the year. During the year of the contract, the screen will be partly filled up with advertising of the predecessor distributor, and during the succeeding year, it will be partly filled up with advertising of the successor distributor. Despite the fact that the distributor is required, in many cases, to pay in advance a guarantee for the exclusive use of the screen for the term of the contract, this right will never be enjoyed. It is essential to proper management that the limited use of the screen for advertising purposes be under the control of one distributor at a time. Salesmen of distributors who solicit advertising must know how many ads they are permitted to sell. They do know this where the screen is subject to exclusive use, but if the screen time is divided between two or more distributors, the salesmen will have to check with the theatre from day to day as to how many ads the theatre will run for their principal, and this will result in a chaotic condition, causing the resentment of the theatre owner, the advertiser and the public.

The Court may wonder why the Commission concluded to limit the exclusive agreements to a term of one year. The reason ascribed is because contracts with advertisers do not generally exceed one year. The Commission erroneously decided that business necessities do not require the screen privilege to go beyond the term of the advertising contract. It is obvious that the year in the two contracts is not co-terminus. If the contracts are limited to one year, M.P.A. at no time will enjoy the exclusive privilege for which it is generally required to pay a guarantee. M.P.A. could not afford to offer the same consideration for a one-year contract as it could for a longer one. The order of the Commission would thus destroy the value of the screen privilege which the theatre has to offer. Instead of accomplishing the desired purpose of increasing competition, the order of the Commission would have the opposite effect of suppressing competition. The only property right which the theatre has to offer is the use of its screen on which to exhibit advertising films. It is apparent that this right is worth very little, indeed, if it is not exclusive. The Commission concedes this by upholding one-year exclusive contracts.

In view of the business necessities above set forth for contracts extending beyond one year, distributors would not be willing to pay the guarantee demanded by the theatres for a screen privilege of such short duration. Thus, the very distributors whom the Commission desires to compete for the screen privilege would no longer have the same incentive to bid for the theatre screens which they now have. Therefore, the effect of reducing the term of the contract to one year would be to destroy competition instead of to encourage it.

The Commission states that M.P.A.'s exclusive con-

tracts have had the effect of forcing some of its competitors to go out of business. The record does not bear out this statement. The competitors of M.P.A. who testified on behalf of the Commission lost out in competition, not because of the existence of exclusive theatre screening agreements, but because of the inferior quality and character of their films, the extreme shortage of film during the war years, their lack of sales organization, their failure to pay the theatres in accordance with their contracts and, particularly, their unwillingness to pay the theatres the amounts offered by other distributors. The only competitors of M.P.A. who testified for the Commission were: T. P. Grinspan, J. A. Pope, W. Bill Reichart, Rene P. Karrigan, Robert Wiegand and Nobles C. Campbell. As hereinafter shown, the testimony of all of these witnesses bears out our contention.

T. P. Grinspan testified that he was connected with Parrot Distributing Company; that that Company had been engaged in the business of producing film advertising, theatre trailers and industrial film for about 28 or 29 years; that his Company did not make screening agreements with theatres, but sold its film outright to advertisers or distributors who made their own screening agreements with theatres; that at one time the Company carried a line of library films but it was discontinued. (R. vol. II 3-4)

On cross-examination Mr. Grinspan testified:

> "A. The volume declined greatly during the war. There was an extreme shortage of film, and the business has been built up in 1946 and 1947." (R. vol. II 4)

On redirect examination he further testified:

"Q. Now, was the dropping of your business caused by the lack of available films?

"A. I am in no position to state definitely what caused the dropping off, so far as my personal knowledge is concerned." (R. vol. II 4)

J. A. Pope testified that he was a distributor of advertising films purchased from the Parrot Distributing Company during the period from 1940 to 1945 in the territory of Arkansas, Oklahoma and southern Missouri, and that some theatres in that territory discontinued or refused to screen advertising for his customers on the ground that they had exclusive agreements with Alexander Film Company, or United Film Ad Service, Inc. He also stated that in 1943 Parrot informed him that the film was getting scarce, and that they might have to discontinue since they could not supply all the advertising film that was wanted.

On cross-examination he testified:

"Q. To the best of your recollection, the theatre managers told you they were under exclusive contract with United?

"A. Well, I wouldn't say whether it was United or Alexander in that case. I don't remember; I don't recall, one of the two of them. In fact, the only competition that I saw was the Alexander and United in my territory. That is all I ever ran into was United or Alexander, one or the two of them." (R. vol. II 5)

W. Bill Reichert testified that he was unable to continue to place film advertising on the screens of certain theatres because of exclusive agreements between the theatres and M.P.A. (R. vol. II 5-8)

On cross-examination he testified:

"Q. Did you ever make an attempt to secure screen privilege with that circuit (Jefferson Amusement Company) after you saw Alexander's contract had expired?

"A. Yes.

"Q. For the whole circuit?

"A. Yes.

"Q. But not offering to pay them any guarantee for the whole 40 theatres?

"A. Not as much as they wanted.

"Q. Not anything?

"A. Yes.

"Q. What was the basis you offered?

"A. $3.00 an ad basis for all their theatres with a guarantee of $3.00, and an option of $4.00.

* * * * *

"Q. What did they want?

"A. $7.50.

"Q. You were not willing to meet that?

"A. No, sir, I was not willing to meet that.

* * * * *

"Q. Why did they turn you down?

"A. They wanted more money.

"Q. Was Alexander paying them more money?

"A. At that time M.P.A. had the circuit—I think you had a split with them—a split service.

"Q. What I mean to say is this—were you going in and offering to pay the theatre more money than they were getting, or less money?

"A. Less money than they were getting.

"Q. So, in other words, they would not give you the theatre screens because your offer was less than what they were getting?

"A. That is right.

"Q. And the same thing is true with the Jefferson Amusement Company—They were able to secure more money from your competitors than you were willing to pay, and for that reason they would not give you the forty theatres. Is that right?

"A. That is right." (R. vol. II 15-17)

Mr. Reichert further testified on cross-examination:

"Q. Mr. Reichert, in the cases in which you have tried to secure screens for your own Company, is it or is it not a fact that Alexander has been in competition with you for obtaining of those screens.

"Mr. Collins: I object to that.

"Trial Examiner Kolb: The objection will be overruled?

"Mr. Rosen: You can answer the question.

"A. Yes.

"Q. Is it also true that M.P.A. has been in competition with you for obtaining those screens?

"A. Yes.

"Q. Is it also true that all three of you have been in competition with each other for those screens?

"A. To the best of my knowledge it is true." (R. vol. II 18)

The witness further testified;

"Q. Have you ever had occasion to offer M.P.A. advertising which you had obtained for exhibition on theatre screens under contract to M.P.A.?

"A. Yes.

"Q. Have they refused to exhibit the films?

"A. Not when possible.

* * * * *

"Q. And in the cases in which they did exhibit the advertising that you wanted exhibited, you were paid the customary commission, were you not, of 15 per cent less 2 per cent discount—I should say plus 2 per cent discount?

"A. I was allowed that commission.

"Q. Isn't that the usual advertising commission in the industry?

"A. That is the usual advertising commission in the industry." (R. vol. II 18-19)

Mr. Reichert, the Commission's own witness, also testified on cross-examination:

"A. I would say from my experience over these years, are 7 or 8, that it is disadvantageous to everyone concerned.

"Q. For what.

"A. For a possibility to exist where a theatre has more than one contract with distributors

* * *

* * * * *

"Q. As I understand your answer, you stated that your experience in the industry has led you to believe that it would be disadvantageous to all concerned—meaning everybody, the theatre and the distributor?

"A. And the advertiser, because he would be wanting his ad on the screen and he could not get it on there after he had bought it, in fact." (R. vol. II 11)

* * * * *

"Q. I understood you to say that it was disadvantageous in your opinion, to all concerned. I was trying to show the practical difficulties of doing business in the way the Government suggests it be done.

"A. I say it would be a disadvantage to the distributor; yes.

* * * * *

"Q. Now, taking up the practical difficulties with regard to the theatre itself, if, as you say, the theatres or most of them limit the advertising to four films per performance, what is the disadvantage or practical difficulty to the theatre in doing business with more than one distributor at the same time?

"A. He makes enemies in the majority of cases because the advertisers, 90 per cent. of the time are his neighbors, attend his theatre, it would be an embarrassment to the advertiser and the theatre man, because the theatre man, himself, just wouldn't know what it was all about." (R. vol. II 13)

Robert Weigand and Rene P. Karrigan testified that they were officers of Commerce Pictures Sales, Inc., a company engaged in the business of the production and distribution of advertising films; that the Company had distributors which entered into screening agreements with theatres; that in some instances they were unable to enter into contracts with theatres because the theatres had exclusive screening agreements with M.P.A. (R. vol. II 22-32, and 32-40)

Weigand testified on cross-examination in connection with his Company's failure to obtain a contract with Jefferson Amusement Company, as follows:

"Q. I understood you to say with regard to Jefferson Amusement Company, you had shown a few films on a test basis and never had gotten a contract from them. Is that right?

"A. That's right.

"Q. Isn't it a fact that subsequent to the test that you made, the Motion Picture Advertising Service Company went in and secured a contract for screening privileges?

"A. Yes. By paying some foreign corporation more than the sum we would be prepared to pay.

"Q. They paid the theatres more money than you ever had to pay; that is why they got the contract?

"A. That's right." (R. vol. II 26)

Weigand further testified on cross-examination, as follows:

"Q. Those contracts that are now held by your distributors are exclusive, are they not?

"A. Yes." (R. vol. II 27)

* * * * *

"Q. Is your Company and your distributor in open competition with the Motion Picture Advertising Service Company in securing screen privileges from theatres in the territory that you testified of?

"A. In answer there are two ways of obtaining contracts. One is a non-exclusive contract, and another is an exclusive contract. In the case of an attempt for an exclusive contract, there is competition." (R. vol. II 27-28)

* * * * *

"Q. Well, now, with regard to the present-day arrangement where you have exclusive con-

tracts with theatres, how many advertisements are those theatres willing to show?

"A. This present-day arrangement, there is nothing modern about exclusive or non-exclusive contracts. Some theatres have exclusive and some non-exclusive. Those non-exclusive are the ones that no one has ever offered enough money to make them exclusive." (R. vol. II 30)

* * * * *

"Q. Has the Motion Picture Advertising Service Company ever refused to exhibit films for advertisers with whom you have contracts on screens that are available to the Motion Picture Advertising Service Company?

"A. Did you say ever?

"Q. Yes.

"A. That would involve my giving a specific instance of a refusal. I wouldn't be able to give a specific instance of a refusal.

* * * * *

"Q. Mr. Wiegand, have you ever requested the Motion Picture Advertising Service Company to exhibit film advertising of your customers on screens under contract to them?

"A. Yes.

"Q. Have they generally accepted the business?

"A. Yes.

"Q. Have they ever refused to accept the business?

"A. * * * I couldn't think of a specific instance in which we were refused." (R. vol. II 31-32)

Rene P. Karrigan testified on cross-examination with regard to his Company's inability to obtain a screen-

ing contract with Jefferson Amusement Company, as follows:

"Q. When you first contacted the Jefferson Amusement Company were they running any screen advertising on their screens?

"A. I don't believe so.

"Q. You made a test run in one theatre free of charge in order to try and negotiate a contract with them for screen advertising rights?

"A. Right.

"Q. After that test run Motion Picture Advertising Service Company made a proposition to them, as a result of which Jefferson Amusement Company entered into a contract with Motion Picture Advertising Service Company, isn't that correct?

"A. That's right." (R. vol. II 33-34)

Karrigan further testified on cross-examination:

"Q. You testified with regard to the Billy Fox Theatres. I understand one is the Fox Theatre in Bunkie, and one was the theatre in Marksville.

"A. Yes, sir.

"Q. Who has the screen agreements with those theatres at the present time?

"A. The Exhibitor's Advertising Company.

"Q. That is your distributor?

"A. That's right.

"Q. * * * What does the contract read?

"A. The contract reads exclusive." (R. vol. II 37)

* * * * *

"Q. Mr. Karrigan, does the Exhibitor's Advertising Service have theatre screening agreements with the Don Theatre of Alexandria?

"A. Yes.

"Q. The Davis of Bossier City?

"A. Yes.

"Q. And the Lake Theatre in Shreveport, Louisiana?

"A. Yes.

"Q. Are those contracts exclusive contracts or non-exclusive?

"A. Exclusive with the Exhibitor's Advertising Company.

"Q. That is your distributor?

"A. That's right." (R. vol. II 39)

* * * * *

"Q. Isn't it true in your experience in booking the films through M.P.A. that they have generally accepted the business in screening and advertising?

"A. They have accepted the majority of the business that we have offered." (R. vol. II 39)

On redirect examination Karrigan testified:

"Q. Mr. Karrigan, counsel asked you if you were able to have your ads screened in more theatres by having access to the theatres controlled by M.P.A. Does the existence of exclusive contracts between M.P.A. and the different theatres give you and your distributors a wider distribution of your advertising films?

"A. To a certain extent." (R. vol. II 39-40)

Nobles C. Campbell testified that he was a distributor of Parrott Films in Kentucky, West Virginia, Virginia and North and South Carolina, and that he had been unable to do business with certain exhibitors be-

cause competitors had exclusive screening agreements. (R. vol. II 40-42)

On cross-examination he testified:

"Q. When you would go into any theatre and get the right to exhibit films, how long would that right exist, for one day, one week, or one year?

"A. That would be up to the theatre.

"Q. Generally; give me a general case.

"A. Generally four weeks is my system.

"Q. Four weeks?

"A. Yes.

"Q. So that you would go into the theatre and get a right from them to exhibit some films for four weeks?

"A. That is right. Then I would call on that theatre three or four times a year. In other words, in place of running continuous I would run a month and off two or three months.

* * * * *

"Q. Then the number that you would put on the screen would depend upon your ability later to sell the ads?

"A. That is right.

"Q. And if you sold ten they put ten on?

"A. That is right.

"Q. And if you sold two they put two on?

"A. That is right.

"Q. And if you sold none they put none on?

"A. That is right.

"Q. Therefore, unless you had made some guarantee of a minimum to the theatres, they would never know after making the contract

with you what consideration they would get from you for that contract, would they?

"A. Until I told them the total." (R. vol. II 46-47)

* * * * * *

"Q. Let me ask you a question about that. Suppose you went into a theatre that was willing to write any kind of an arrangement you wanted. I understand that your policy is that you would run for one month and then be off for three months?

"A. That is right.

"Q. That is your way of doing business?

"A. That is right.

"Q. So that according to your method the theatre would get consideration for the month it ran its ads with you and the next three months they wouldn't get any ads?

"A. That is right." (R. vol. II 51)

Ernest Hugh Forsythe, a witness for respondent, testified as follows:

"Q. What was your arrangement with Theater Publicity Service as to when they should pay you for screening?

"A. Well, the contract called to be paid, you know, on the first of the month but when I was running the ad they paid me every week. That is how come me to run it six weeks without trying to find out anything about it because I figured they would pay me after it run a month, and I run it for six weeks and I still had not received any check for them or heard from them.

"Q. Then what did you do?

"A. Then I called them and their phone was temporarily disconnected and I tried to find out

what was the matter and I couldn't find out, so I took the ad off the screen.

"Q. Did you ever put the ad back on the screen?

"A. No, sir.

"Q. Were you paid for the six weeks service that you had run?

"A. No, sir.

"Q. You had been paid for the prior six or seven weeks—

"A. Yes, sir.

"Q. —at the beginning? Have you at any time been paid for the last six weeks that you ran it?

"A. No, sir." (R. vol. II 226)

That M.P.A. has not unduly suppressed competition is amply shown by the testimony that theatres frequently change distributors from time to time. There were introduced in the record 49 letters received by M.P.A., 29 of which were notices from theatres that their screens had been taken away from M.P.A. and given to competitors, and 20 of which were notices from theatres that their screens had been taken away from competitors and given to M.P.A. These are the samples of the vast amount of competition that exists among the distributors to obtain theatre screening agreements. (R. vol. II 84)

The record further shows that about one-third of M.P.A.'s contracts come up for renewal each year, so that the average length of the agreements is about three years. Under the circumstances shown to exist, competitors of M.P.A. have the right to, and actually do, compete for these contracts at all times, and are able to take away from M.P.A. a third of its contra s each

year. The success of competitors in taking away the theatres depends chiefly upon the amount they are willing to pay to the theatres. It also depends upon the quality and character of the advertising films, and the ability of the distributors to pay the theatres in accordance with contract. Theatres themselves frequently insist upon guarantees, sometimes payable in advance, and some also insist upon contracts having a duration in excess of one year. It would not be profitable to pay the guarantee demanded for a one-year contract, even if the theatre were willing to accept such a short term. No contract at all could be obtained if the theatre demanded a contract for a longer term than one year, and the courts prohibited M.P.A. from making such a contract.

We submit that since the record shows that there is now, and always has been from the very beginning of the business, free, open, active and substantial competition among film advertising distributors, no showing whatever has been made by the Commission that the contracts of M.P.A. unreasonably restrain competition, or tend to create a monopoly. If the duration of the contract is cut down, there will be imposed upon the parties an arbitrary and unreasonable rule which would cause injury to the theatres, the distributors, the advertisers, and would not be in the interest of the public.

As pointed out by Commissioner Lowell B. Mason in his dissenting opinion, the chief benefactor of motion picture advertising is the small theatre owner, and the revenue thus obtained by the small theatre owner is a subsidy to keep him alive. Large deluxe theatres universally refuse to permit advertising on their screens. To say that a theatre owner has the right to lease the

roof of his theatre for an advertising sign for a period of five years is legal, but to lease the use of his screen for the exhibition of motion picture advertising for any period in excess of one year is illegal, is obviously unsound. No one has ever contended that outdoor advertising companies may not lease vacant lots for any period of time they choose, but now it is contended, for the first time since the inception of this industry more than thirty years ago, that theatre screens may not be leased for motion picture advertising for more than one year.

Furthermore, we submit that the record fails to establish that the contracts of M.P.A. tend to create a monopoly. At the time of the trial of this case in 1947 there were approximately 20,000 theatres in the United States, of which about 12,600 exhibited screen advertising. M.P.A. has exclusive contracts with about 1100 for a period of five years, or about 5½% of 20,000, and 8.7% of 12,600. These are the contracts now sought to be banned by the Commission. It is obvious from these figures that M.P.A. has no monopoly of screens by virtue of its five-year exclusive contracts.

In order to try to establish that M.P.A. has a monopoly, the Commission has added together all the exclusive contracts of M.P.A. and all those of the other three distributors, against whom complaints were instituted, (many of which were for one year terms), and then argues that the total number of exclusive agreements held by all four respondents in the aggregate approximated 75% of the total theatres willing to show screen advertising. This argument is amply refuted in the dissenting opinion of Commissioner Lowell B. Mason, who said:

"The majority opinion written to apply to the four companies sued states:

"'The total number of exclusive agreements held by respondents in the aggregate approximated 75% of total number.'

"To carry this reasoning a step further, if the F. T. C. had sued all the film ad companies we could justify antimonopoly orders against a tyro with two dollars worth of annual business on the grounds that he with all the others approximated 100% of the total industry." (R. 70)

Commissioner Mason further said:

"I do not believe we should prohibit a theatre owner from leasing exclusive space in his lobby, his basement, his roof or even on his screen for as long as he wants provided the subject matter of the ad is legal. Yet that is in actual effect what the order here does. It restricts one class of persons (trailer ad distributors) from buying what another class (theatre owners) may want to sell, namely a lease for more than one year.

* * * * *

"As I pointed out at the beginning, trailer ads are a source of income to small theatres. The large and powerful movie house disdains to use such films. As a consequence, any restriction on the right to lease screen time affects only small businessmen. For them, it may be that portion of income which represent the difference between profit and loss. I think the question as to whether a long or short lease is the better should be left to the judgment of the small businessman. At least I would like him to have the privilege of choice. Nowhere in our 43 volumes of decisions can I find where we have held a one-year lease was legal but that the same lease for a longer

period was an unfair act or practice in commerce." (R. 69)

The Commission suggests that it substitute its judgment as to the duration of the contract for that of the theatre owner and the distributor, and this despite the fact that the record establishes that there is, and always has been, free and open competition among the distributors to secure such contracts, and that from the beginning of the industry, distributors have sought and obtained exclusive screening agreements for periods of one to five years.

The Court of Appeals, after a full consideration of this matter, said:

> " * * * The record shows that there is free and open competition among the distributors to secure such agreements, and that, from the beginning of the industry, distributors have sought and obtained exclusive screen agreements. The Commission having determined that exclusive agreements are not unfair or illegal *per se* but are necessary for the operation of the business, we are confronted with preponderating testimony that no prudent person would invest sufficient capital in the business without assurance of exclusive screening space for a longer period than one year; and that theatres themselves frequently demand guaranties for a longer period, or otherwise refuse to exhibit motion picture advertisements.
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> * * * * *
>
> "The petitioner's solicitation and obtaining of exclusive theatre screening agreements are methods of competition in commerce, but the proof has failed to establish that they are unfair or that their prohibition would be in the public interest. Thus there are absent two distinct prerequisites

to the power of the Commission to issue its order in this case to cease and desist. Cf. *Federal Trade Commission v. Raladam Company*, 283 U.S. 643, 646, 648.

* * * * *

"Let the business of petitioner be legitimate; let its method of conducting it be open, honest, without substantial monopolistic tendency, and free from deceptive acts and practices; all of which is presumed to be true, and which presumption is not rebutted by the evidence: then no means that are just, truthful, reasonable, and requisite to the successful operation of the business, are unfair methods of competition in commerce in violation of the Federal Trade Commission Act.

"Therefore, with available space and time for advertisements on the screen of motion-picture exhibitors severely limited, and with the business of distributors, by its nature, making it necessary that they have an assured outlet for a reasonable time for the screening of their prospective advertisements, we conclude that petitioners' method of soliciting and obtaining exclusive contracts with exhibitors for longer periods than one year was not unfair or unreasonable, but was rendered desirable and necessary by good-business acumen and ordinarily prudent management. Consequently, the cease and desist order of the Commission is set aside and the complaint dismissed. *Goldberg v. Tri-State Theatre Corp.*, 126 F. (2) 26; *United States v. Western Union Telegraph Co.*, 53 Fed. Supp. 377. * * * " (R. 82-86)

In the case of *Goldberg v. Tri-State Theatre Corp.*, 126 F. 2d 26 (CCA 8th, 1942), two theatre buildings in Omaha, Nebraska, were owned by the same party. The buildings were the State Theatre building and the World Theatre building. The assignee of Tri-States Theatre

Corp. had entered into a sublease covering the World Theatre building, which sublease agreement contained a covenant that the owner would not use or permit the use of the State Theatre building as a motion picture theatre. The State Theatre building was thereafter used as a motion picture theatre in violation of this restrictive covenant and a suit was filed to enjoin such use.

The Court, in an opinion by Johnson, Circuit Judge, in upholding the validity of such a restrictive covenant, and in granting the injunction, at page 29 said:

> "The validity of the agreement, as a restraint upon trade, is not seriously open to question under the general contract law of Nebraska. An agreement which places a restriction upon the use of certain real estate is not invalid in Nebraska, as being an unreasonable restraint of trade, where the restriction is purely ancillary to the acquiring of an interest in another piece of real estate for commercial purposes; where it places only a limited restraint as to period and manner of the use of such property; where it does not appear to be greater than reasonably to serve as a protection in accomplishing the legitimate commercial purpose for which the interest in the other real estate involved was acquired; and where it does not have as its primary object or as its direct result the fostering of some illegal monopoly."

In the case of *United States v. Western Union Telegraph Company, et al.*, 53 Fed. Supp. 377, a proceeding in equity was instituted by the United States against Western Union Telegraph Company and certain of its officers to enjoin the enforcement of certain exclusive contracts that had been entered into with various railroad, transportation and terminal companies, hotels, public buildings and sports arenas. The agreements were

lease arrangements whereby Western Union, as lessee, was granted the exclusive right of occupancy, the lessors covenanting that during the term of the agreements no space in the premises would be leased to competing telegraph companies. The petition charged (a) a conspiracy among the defendants to restrain trade in commerce; (b) that the enforcement of the contracts was in restraint of trade in commerce; and (c) that the defendants had attempted to monopolize interstate trade in commerce in telegraph communication.

The District Court for the Southern District of New York, in an opinion by Nevin, D.J., at page 381, stated the question for determination as follows:

> "The Government's case stands or falls on the question whether the contracts, singly or in the aggregate, constitute a violation of the Sherman Act. Section 3 of the Clayton Act, 15 U.S. C.A., § 14, prohibiting certain restrictions in connection with the sale or lease of tangible property, the source of so many of the decisions on which the Government usually relies in anti-trust cases, does not apply and is not invoked. The Federal Trade Commission Act, 15 U.S.C.A. § 41, *et seq.*, does not apply to telegraph companies and is not invoked. The question arises under the Sherman Act alone, and the issues are these: (1) Whether the contracts are unlawful restraints of trade under Section 1. (2) Whether, if not, defendants can be held to have unlawfully monopolized or attempted to monopolize commerce under Section 2 by means of a series of such contracts any of which separately would concededly be lawful."

The Court held that the Sherman Act had not been violated and ordered the petition dismissed, and, in so holding made, among others, the following Conclusions

of Law at page 392:

"3. The defendant company and its officers, the individual defendants, have not engaged in a conspiracy to restrain trade and commerce in telegraph communication and to monopolize such commerce by making exclusive contracts with railroad, transportation and terminal companies, the owners of hotels, public buildings and sports arenas, for the purpose of excluding competing telegraph companies from such premises and therefore have not violated Sections 1 and 2 of the Sherman Anti-Trust Act.

"4. The exclusive contracts entered into by the defendant company and railroad, transportation and terminal companies, the owners of hotels, public buildings and sport arenas, while gaining for the defendant company a competitive advantage, do not constitute an unreasonable restraint of interstate trade and commerce in telegraph communication in violation of Section 1 of the Sherman Anti-Trust Act.

"5. The exclusive contracts with railroad, transportation and terminal companies, owners of hotels, business buildings and sports arenas entered into by defendant through its officers and agents, do not form a part of a nationwide plan to exclude competing telegraph companies from such locations, but rather are of the usual incidents attendant to a vigorous prosecution of the business of the defendant, and the defendant company and its officers and agents have not attempted by means of such contracts to monopolize interstate trade and commerce in telegraph communication in violation of Section 2 of the Sherman Anti-Trust Act.

"6. The exclusive provisions of the contracts between the defendant and the railroad, transportation and terminal companies, owners of hotels, business buildings and sports arenas

are lawful and valid and not in violation of the terms of Section 1 and 2 of the Sherman Anti-Trust Act."

The Court of Appeals in reversing the Commission in the case at bar also held, and we submit correctly, that the contract between respondent and the theatre is one of agency, citing *Federal Trade Commission v. Curtis Publishing Company*, 260 U.S. 568. In that case this Court upheld an exclusive agreement between Curtis Publishing Company and its distributors requiring the distributors to distribute the periodicals of Curtis Publishing Company to the exclusion of the periodicals of all other competitors during the term of the contract, and, at pages 581 and 582 said:

> "The engagement of competent agents obligated to devote their time and attention to developing the principal's business, **to the exclusion of all others**, where nothing else appears, has long been recognized as proper and unobjectionable practice. The evidence clearly shows that respondent's agency contracts were made without unlawful motive and in the orderly course of an expanding business. It does not necessarily follow because many agents had been general distributors, that their appointment and limitation amounted to unfair trade practice. And such practice cannot reasonably be inferred from the other disclosed circumstances. Having regard to the undisputed facts, the reasons advanced to vindicate the general plan are sufficient.
>
> "Effective competition requires that traders have large freedom of action when conducting their own affairs. Success alone does not show reprehensible methods, although it may increase or render insuperable the difficulties which rivals must face. The mere selection of competent, successful and **exclusive** representatives in the or-

derly course of development can give no just cause for complaint, and, when standing alone, certainly affords no ground for condemnation under the statute." (Emphasis supplied)

That case presents an exact parallel with the case at bar. There, Curtis Publishing Company entered into agreements with news dealers whereunder the dealers were appointed as exclusive agents to distribute the periodicals of their principal, subject to the condition that the agents would not, during the life of the contract, distribute the periodicals of competitors. Here, respondent enters into agreements with theatres whereunder the theatres are appointed as agents of respondent to display the advertising films of respondent, subject to the condition that the theatres will not, during the life of the contract, display the advertising films of competitors.

We submit that the principle announced in the *Curtis* case is fully applicable here, and that the mere selection of competent, successful and exclusive representatives in the orderly course of business, where the agency contracts are made without unlawful motive, does not constitute an unfair method of competition, and affords no ground for condemnation under the statute. The Commission contends that the *Curtis* case is not in point, on the ground that the screening agreements are not contracts of agency, but are purchase and sale agreements of screen space in the theatres, and quotes the language of the contract, which states:

"The exhibitor transfers, sells and assigns to the distributor * * * the exclusive screen advertising privileges * * *."

Despite this language, the courts of several states have held that these agreements are not contracts of

sale but are mere contracts of agency in which the theatre owner is appointed as the agent of the advertising distributor to exhibit advertising films on his screens. These decisions were rendered in cases involving occupational license taxes. In deciding that the distributor did a local business in the state in which the theatre was located, the courts have uniformly held that the local business consisted of the exhibition of advertising films on the screens of the theatre through the medium of the theatre owner as an agent appointed by the distributor. See *State For Use of Independence County v. Tad Screen Advertising Co.*, 133 S.W. 2d 1.

We, therefore, submit that the Court of Appeals was correct when it said:

> "In another aspect, we have here a contract of agency, and our decision is governed by *Federal Trade Commission v. Curtis Publishing Co.*, 260 U.S. 568. In a strict legal sense, the theatre owners and operators have not sold or leased the petitioner any screening space, nor granted it any easement thereto; they are not the lessors or vendors of anything; it is the distributor who furnishes the films by bailment to the exhibitor. It is different from an easement for an advertisement on a lot or building where the sign is erected by the advertiser, and the owner merely granted the right to put it there. Here the distributor has no right to enter the theatre and operate the machine or display the advertisements; he has a contract for personal services, which the exhibitor is obligated to perform. The exhibitor agrees properly to display the advertisements at the rates and as provided in the screening agreement; and, with the exceptions stated, not to display any advertising films other than those furnished by the distributor. In other words, the exhibitor agrees to perform a specified service, for a stated

period, at an agreed rate of compensation, and not to undertake the same service for any other distributor during the same period."

Decisions Cited by Commission Inapplicable

All of the cases cited by the Commission are easily distinguishable from the case at bar.

Fashion Originators' Guild of America, Inc. v. Federal Trade Commission, 312 U.S. 457, is cited to show that a violation of Section 3 of the Clayton Act is *per se* a violation of Section 5 of the Federal Trade Commission Act. In that case the Federal Trade Commission sought to obtain a cease and desist order against several manufacturers of women's garments and manufacturers of textiles used in their making, on the ground that they had entered into a combination and conspiracy to refuse to sell manufacturers and retailers of garments who dealt in the products of others who copied their designs and generally sold them at lower prices, and in order to effectuate the boycott, the combination employed shoppers to visit the retailers' stores, established tribunals to determine whether garments were copies of their own designs, audited the books of its members, fined them for violation of its regulations, etc. The respondent argued that their boycott and restraint of interstate trade was not within the ban of the policies of the Sherman and Clayton Acts because their practices were reasonable and necessary to protect the manufacturer, laborer, retailer and consumer against the evils accruing from the pirating of original designs, and had in fact, benefited all four. But this Court held that the purpose and object of the combination, its potential power, its tendency to monopoly, the coercion it could and did practice upon rival competitors,

all brought it within the prohibition declared by the Sherman and Clayton Acts. For this reason, the Court held that it was not error to refuse to hear the evidence offered, for the reasonableness of the methods pursued by the combination to accomplish its **unlawful object is no more material than would be the reasonableness of the prices fixed by unlawful combination.** There, the respondents were charged with a conspiracy to restrain trade, and the conspiracy and the restraint were duly proved against them. Their only answer was that the methods used by them in carrying out the conspiracy were reasonable and benefited the conspirators. Once the conspiracy was proved and the object sought to be accomplished by it was found to be unlawful, the reasonableness of the methods used to carry out the unlawful conspiracy were, of course, immaterial.

In our case, no conspiracy whatever is charged, and no unreasonable restraint of trade is shown.

Likewise, the inapplicability of the case of *Carter Carburetor Corporation v. Federal Trade Commission*, 112 F. 2d 722, is illustrated by the fact that the Carter Carburetor Corporation, by contract with its dealers and distributors, required them to carry a stock of equipment and parts, and provided for the price to be paid or the discounts to be received. In addition, all dealers were notified that if they took on "a new carburetor line without our written approval, preferential discount, service information, and Carter contract, if any, will be discontinued by the Carter distributors". In addition, confidential bulletins were sent to all regional and zone distributors, requesting them to call on all dealers handling the Chandler-Grove carburetor line, and advise such dealers that if they continued to handle the Chand-

ler-Grove carburetor line after a certain date, their Carter contracts would be cancelled. It was shown that the Carter carburetor was used by a majority of the car manufacturers and, therefore, the Carter dealers had no choice but to cancel their dealings with competitors. The facts clearly indicate a violation of Section 3 of the Clayton Act.

There is no proof in the case at bar that the purpose of M.P.A.'s contracts are to hinder competition, or tend to create a monopoly. As a matter of fact, paragraph 3 of the Complaint in this case charges, and it is conceded, that there is free, open, active and substantial competition between M.P.A. and other distributors of motion picture advertising films for the securing of theatre screening agreements.

The Commission also cites the case of *International Salt Company, Inc. v. United States*, 332 U.S. 392, in which the Government sought to enjoin International Salt Company, Inc. from carrying out provisions of its leases of patented machines, which provided that lessees would use therein only International's Salt products. This Court there held that the agreements were in violation of Section 3 of the Clayton Act. This is a typical Tying Clause Arrangement which Section 3 of the Clayton Act was specially enacted to prohibit. It is obvious that that case has no application whatever to the case at bar.

Again, in the case of *Standard Oil Company of California v. United States*, 337 U.S. 293, Standard entered into contracts with independent dealers, which contained requirements that such dealers purchase all or a specified portion of their products from Standard, thereby prohibiting the dealers from making any purchases

from competing oil companies. This, again, was held to be violation of Section 3 of the Clayton Act, and the Federal Trade Commission here seeks to use the holding of the Court in that case as authority for the case at bar, notwithstanding the fact that M.P.A. admittedly has not violated Section 3 of the Clayton Act, and is not charged in the complaint with so doing. In the *Standard Oil* case there was no question as to what constituted a reasonable length of time for the exclusive contracts to run. Standard Oil Company was the seller, whereas here, M.P.A. is the lessee of screen time in theatres. The *Standard Oil* case is, for these reasons, completely distinguishable.

In the case of *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, this Court upheld an order of the Federal Trade Commission which required cement manufacturers and an association formed by them to cease and desist from acting in concert in pricing their goods on a multiple basing point system by which, irrespective of the location of the mill, the price would always be the mill price at the basing point plus freight, as being an unfair method of competition prohibited by Section 5 of the Federal Trade Commission Act, and for the further reason that the combination to use such system had effected a systematic price discrimination in violation of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. Section 2-a of that Act declares it to be unlawful to discriminate in price between different purchasers of commodities of like grade and quality where the effect of such discrimination may be substantially to lessen competition, or tend to create a monopoly. There was, therefore, a specific violation of Section 2 of the Clayton Act. In the instant case, there is no element of price discrimination, and, again, the

Cement Institute case does not involve exclusive contracts.

In the case of *Federal Trade Commission v. Beechnut Packing Co.*, 257 U.S. 441, it was held that the action of a manufacturer in issuing circulars to its trade suggesting uniform resale prices, both wholesale and retail, to be charged for its products, and in refusing to continue to sell to any dealer who failed to maintain such prices, or who sold to another dealer failing to maintain them, was an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act. This ruling does not strike at exclusive contracts but at price fixing by manufacturers. In our case, prices are in no way involved.

The case of *Federal Trade Commission v. Pacific States Paper Trade*, 273 U.S. 52, is also a price fixing case, and, as such, is entirely distinguishable from the instant case.

The Commission attempts to argue that although M.P.A. is not here charged with a violation of Section 3 of the Clayton Act, but only with a violation of Section 5 (a) of the Federal Trade Commission Act, any violation of Section 3 of the Clayton Act is *per se* an unfair method of competition and as such a violation of Section 5 (a) of the Federal Trade Commission Act. In its brief, the Commission states on pages 25-26:

> " * * * Aside from this, Section 3 of the Clayton Act reflects a strong public policy against exclusive-dealing arrangements. That section flatly prohibits such agreements by buyers of goods where the effect may be to substantially lessen competition or to create a monopoly in any line of commerce. *Standard Oil Co. v. United States,*

> 337 U.S. 293; *Richfield Oil Corp. v. United States*, 343 U.S. 922. Although the contracts in the instant case are presumably not within Section 3 since the exclusive commitment is by the seller of screen space (the theatre) rather than by the buyer (respondent), the effect on competition is the same in either situation. The basic public policy against exclusive-dealing arrangements which adversely affect competition, as declared by Section 3 of the Clayton Act, brings respondent's exclusive contracts within the Commission's authority to prohibit unfair methods of competition."

At a glance it will be seen that the argument is that although M.P.A. is not in violation of Section 3 of the Clayton Act (because it is not the seller or lessor of theatre screens, but is the purchaser or lessee thereof), nevertheless, the effect of M.P.A.'s exclusive screening contracts is exactly the same as it would be if M.P.A. had violated Section 3 of the Clayton Act. M.P.A. simply enters into exclusive screening agreements with theatres, not as the seller or lessor—but as the purchaser or lessee of screen space under an agreement whereby the theatre is appointed as the agent of M.P.A. to exhibit M.P.A.'s advertising upon its screens for a limited period of time. Considering the limited amount of screen space available for advertising, M.P.A. could not afford to pay the large guarantees demanded by the theatres for the screen space, unless it could be assured of the availability of this space for a reasonable period of time.

In making the contention that exclusive theatre screening agreements constitute a violation of Section 3 of the Clayton Act, the Commission has assumed the very issue in the case. M.P.A. does not admit that its screening agreements constitute a violation of the Clayton Act, or that they constitute an unfair method of competition.

Film advertising affords the theatre owner a desirable source of extra revenue. This revenue is secured by the theatre owner entering into exclusive theatre screening agreements for reasonable periods of time. Many theatre owners demand large guarantees and a considerable proportion of the advertising revenue for making their screens available. Certainly, M.P.A. could not pay the consideration demanded unless it could be assured that the limited space acquired would be available to it when a contract was later entered into with an advertiser.

Plea of "Res Judicata"

M.P.A. filed a plea of *"res judicata"* on the ground that the sole issue raised in this complaint has been adjudicated in the former complaint brought by the Federal Trade Commission in the matter of *"Screen Broadcast Corporation, et al."* Docket No. 4736; 36 F.T.C. 957, and, therefore, the present complaint should be dismissed.

The plea was overruled by the Commission, and although urged in the Court of Appeals was not passed on since the Court rested its decision on the merits.

The sole issue raised in the present complaint is whether the provision in theatre screening agreements whereunder M.P.A. is granted for limited periods of time an exclusive privilege of exhibiting commercial advertising films on the screen of the theatre under contract has the effect of restraining competition, and constitutes an unfair method of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act. This very issue was presented in the complaint brought by the Commission on March 19, 1942 in the matter of *"Screen Broadcast Cor-*

poration, et al.", Docket No. 4736, against M.P.A. and other respondents therein named. There was a final adjudication upon this issue.

In the former complaint, Docket No. 4736, the Commission alleged in Paragraph Four, sub-paragraph (a) as follows:

> "The respective respondent distributors entered into **individual** contracts with moving picture exhibitors for the exclusive privilege of exhibiting commercial or advertising motion picture films in the theatre or theatres owned or controlled by the said exhibitors for a specified period of time, usually for five years."

and in Paragraph Seven of said complaint, the Commission further alleged:

> "The acts and practices of the respondents as herein alleged are all to the prejudice of competitors of respondent distributors and of the public; have a dangerous tendency to hinder and prevent, and have actually hindered and prevented, competition in the sale, leasing, rental and distribution of commercial motion picture films in commerce within the intent and meaning of the Federal Trade Commission Act; have unreasonably restrained such commerce in commercial motion picture films and have a dangerous tendency to create in respondents a monopoly in the sale, leasing, rental and distribution of said films, and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act."

M.P.A. answered Paragraph Four (a) as follows:

> "Respondents admit the allegations of subparagraph (a) of PARAGRAPH FOUR of the Complaint, except that respondents deny that all

such contracts provide for the exclusive right to display motion picture advertising films in the theatre with which such contract is made, whereas, on the contrary, the vast majority of such contracts with motion picture theatres are non-exclusive in character, and respondents further deny that such contracts with theatres are usually for a period of five years."

and M.P.A. denied the allegations of Paragraph Seven.

M.P.A. agreed to a stipulation of facts with the Commission under date of August 31, 1942. Said stipulation contains the following admission:

> "The respective respondent distributors entered into **individual** contracts with moving picture exhibitors for the exclusive privilege of exhibiting commercial or advertising motion picture films in the theatre or theatres owned or controlled by the said exhibitors for a specified period of time, usually for five years."

After a full and complete hearing upon that complaint, including the issue above set forth, the Commission rendered a decision, dated June 25, 1943, and a cease and desist order based thereon. Under Paragraph Five of the findings of fact in said decision, the Federal Trade Commission found:

> "The respondent distributors, acting in cooperation with one another and through and in cooperation with respondent GSA, respondent Association, and respondents J. D. Alexander and C. J. Mabry, have at various times since the year 1933, and particularly during and since the year 1937, entered into understandings, agreements, combinations, and conspiracies between and among themselves and with other film distributors as to * * * Pursuant to such understandings, agreements, combinations, and conspiracies, and in furtherance thereof, these respondents have acted

in concert and in cooperation with one another in doing and carrying out the following acts and practices:

"(a) The respective respondent distributors entered into **individual** contracts with moving picture exhibitors for the exclusive privilege of exhibiting commercial or advertising motion picture films in the theatre or theatres owned or controlled by such exhibitors for a specified period of time, usually for five years * * * ."

The cease and desist order rendered pursuant to said opinion covered the very same issue here presented again, namely, the right of respondents to enter into exclusive screening contracts with theatres, since the cease and desist order in the former case contained the following prohibition:

"IT IS ORDERED that respondent Association of Advertising Film Companies, an unincorporated trade association, and its officers; respondents C. J. Mabry, individually and as Secretary of said Association; respondent distributors, Motion Picture Advertising Service Co., Inc., United Film Ad Service, Inc., Ray-Bell Films, Inc., Alexander Film Co., and A. V. Cauger Service, Inc., corporations, and their respective officers; and said respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, leasing, renting, and distribution of commercial motion picture films in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, agreement, understanding, combination, or conspiracy between or among any two or more of said respondents, or between any one or more of said respondents and others not parties hereto,

to do or perform any of the following acts or things: * * * "

2. Entering into contracts with motion picture exhibitors for the exclusive privilege of exhibiting national advertising by means of commercial motion picture films in theatres owned, controlled, or operated by such exhibitors."

Compare the above order with the relief sought in the former proceeding by the Commission. On the issues alleged in the former complaint the Commission sought to obtain a cease and desist order to prevent respondents from entering into **individual** exclusive theatre screening agreements, whether such agreements were the result of a combination or conspiracy, or were merely the individual acts of each respondent, but the Commission refused to grant the full relief asked, and limited the prohibition in the cease and desist order to the entering into of exclusive theatre screening agreements **only where they were made as the result of a combination or conspiracy, leaving each individual respondent free to enter into exclusive contracts so long as they were the individual acts of the respondent and not the result of a combination or conspiracy.** The Commission did not decide that no issue was raised in that complaint concerning the right of each individual respondent to enter into exclusive theatre screening contracts, but, on the contrary, decided that this was an issue in the case, and resolved that issue against the Commission, and limited the prohibition in the cease and desist order to exclusive contracts only where they were the result of a combination or conspiracy.

That the same issue was raised in the former proceedings as is here presented is amply shown by the following quotation from pages 9 and 10 of the brief

of Mr. Everett F. Haycraft, trial attorney in the former case:

"CONCLUSION AND RECOMMENDATION."

"In conclusion counsel for the Commission respectfully submits that the record in this case discloses indisputable facts which support the charges of the complaint and that the activities of the respondent herein are unfair methods of competition and violate the provisions of Section 5 of the Federal Trade Commission Act. In this connection it is recommended that an order be entered against the respondents substantially as follows:

> "'IT IS ORDERED that the respondent distributors (naming them), their officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, selling, leasing, renting or distributing commercial motion picture films in commerce as commerce is defined in the Federal Trade Commission Act do forthwith cease and desist from: * * * '
>
> "'(4) **Entering into contracts with moving picture exhibitors for the exclusive privilege of exhibiting national advertising by means of commercial or advertising motion picture films in theatres owned, controlled or operated by said exhibitors, for any specified period of time, provided, however, that any respondent distributor may contract with any exhibitor for the exclusive showing of a single national advertising campaign by means of motion picture film for any national advertiser;** * * * '" (Emphasis supplied)

A reference to the ten numbered paragraphs contained in Mr. Haycraft's recommended form of cease

and desist order shows that all of said paragraphs, except paragraph (4), specifically mention that the respondents are not to conspire, combine, cooperate or enter into agreements with each other covering the subject matter of each individual paragraph of the order. Paragraph (4) alone of the recommended order deals only with the individual acts of each respondent in entering into exclusive theatre screening contracts with motion picture exhibitors. Paragraph (4) has no reference whatever to conspiring, combining, cooperating or entering into agreements with each other. The complaint in the former case charged that each respondent distributor entered into **individual** contracts with moving picture exhibitors for the exclusive privilege of exhibiting commercial or advertising motion picture films. The stipulation of facts admitted that allegation of the complaint. Mr. Haycraft, counsel for the Commission, recommended that the cease and desist order prohibit respondent distributors from entering into individual exclusive theatre screening contracts. It is, therefore, clear that the complaint in the former case presented the same issue here presented, and that the attorney for the Commission sought there the same relief that is sought here, but the Commission refused to grant the full relief that he asked for.

If there were any lingering doubt as to whether the precise issue raised in the present complaint was also raised in the former complaint, such doubt is cleared up by correspondence from Mr. Delos C. Johns, a member of the firm of Morrison, Nugent, Berger & Johns, attorneys for United Film Ad Service, Inc., to Mr. Everett F. Haycraft, attorney for the Commission.

In connection with the Commission's requirement that each respondent file a report of compliance with

the provisions of said cease and desist order, the question arose as to the proper interpretation to be given to the above quoted paragraphs of said order, and, in connection therewith, Mr. Johns wrote Mr. Haycraft on August 6, 1943 as follows:

> "The attorneys for some of the respondents find that they are not entirely in agreement as to the construction to be placed upon that part of the Commission's cease and desist order which deals with 'contract with motion picture exhibitors for the exclusive privilege of exhibiting national advertising by means of commercial motion picture films in theatres owned, controlled, or operated by such exhibitors'. It is noted that there is a substantial difference between the wording of the Commission's order and the wording of the recommended order as set forth on page 10 of your brief. Specifically, the disagreement among counsel concerns the question whether the order prohibits the respondent advertising film companies from making exclusive contracts with theatres **separately and independent of each other and without a planned common course of action, agreement, understanding, combination or conspiracy between or among the respondents, with respect to national advertising, or whether the order leaves each individual respondent company free to make exclusive contracts with theatres so long as it is not done pursuant to agreement, understanding, combination or conspiracy between or among respondents.**
>
> "Furthermore, there is a difference of opinion among counsel as to whether the Commission's order in any event requires the respondent companies to cancel the exclusive provisions of existing contracts with respect to national advertising, or whether the order only prohibits the making of new contracts containing exclusive provisions with respect to national advertising.

"It would be very much appreciated if some clarification of these questions could be obtained prior to the time when we are compelled to file our reports of compliance. Therefore, it is suggested, if you will be so kind as to do so, that you telephone me at my expense at your first convenience so that we may discuss the matter. I think it may be preferable for us to talk about it rather than merely to exchange letters. In view of the congested condition of the long distance lines I suggest that, if convenient, you might call me at 10 o'clock, Central War Time on next Tuesday morning, August 10th, unless some other time is preferable to you, in which event I suggest you telegraph me in advance so that I can arrange to be in my office at your time." (Emphasis supplied)

On August 12, 1943, Mr. Haycraft telephoned Mr. Johns long-distance from Chicago to Kansas City and the substance of that conversation was reported by Mr. Johns to the attorneys for the other respondents in a letter of Mr. Johns, dated August 12, 1943, reading as follows:

"Not until today was I able to talk with Mr. Haycraft. He is in Chicago, and my letter was forwarded to him. He called me early this afternoon after having reviewed his file and refreshed his recollection.

"Mr. Haycraft states quite frankly that it appears to him that the Commission was unwilling to make the Order with respect to exclusive theatre contracts as stringent as he (Haycraft) had recommended. In other words, he says it appears that the Commission was unwilling to attempt to prohibit the making of exclusive contracts with theatres in all events, but was content, on the other hand, to prohibit only the use of exclusive theatre contracts, by design, agreement and con-

spiracy among the respondents, as a means of dividing up the territory for the purpose of servicing national advertising accounts. **Mr. Haycraft states that in his view of the Order as entered any respondent may make a separate and individual contract with a theatre providing for the exclusive right to show motion picture advertising films, so long as the contract is not made or availed of for the purpose of effectuating an unlawful scheme between or among respondents with respect to national screen advertising.**

"I asked Mr. Haycraft specifically whether in his view of the Order it would be necessary for us to cancel existing exclusive theatre contracts. Without hesitation his answer was 'no'. He pointed out that paragraph 2 on page 2 of the Order prohibits only entering into such contracts. I think it is significant that paragraph 2 omits the words 'continuing or carrying out'.

"Upon the basis of my conversation with Mr. Haycraft I am now satisfied to make and file a report of compliance which negatives the existence of any plan, common course of action, agreement, understanding, combination or conspiracy to which United is a party for entering into exclusive contracts with theatres concerning national advertising. I propose to advise United that it is not necessary for it to cancel its existing contracts with theatres. * * * " (Emphasis supplied) (These two letters were stipulated in the record on September 9, 1947 as Exhibits RX-1, RX-2.)

From the above letters it is quite clear that the Commission refused to accept Mr. Haycraft's recommendation that the cease and desist order prohibit the making of exclusive contracts with theatres in all events, and limited the prohibition to the entering into of exclusive theatre contracts only where they were made by

agreement or conspiracy among the respondents.

What is sought in the present complaint is merely to re-try that same issue, which was decided against the Commission in the former proceeding.

In *George H. Lee Co. v. Federal Trade Commission*, 113 F. 2d 583, the Circuit Court of Appeals, Eighth Circuit, sustained a plea of "*res judicata*" to a complaint brought by the Federal Trade Commission under the following circumstances: There, respondent, a Nebraska corporation, was engaged in advertising, distributing and selling in interstate commerce a product called "Gizzard Capsules" as a remedy or vermifuge for worms in poultry. The complaint of the Commission was that the advertising falsely represented the curative qualities of said product and, accordingly, constituted an unfair trade practice within the meaning of Section 5 of the Federal Trade Commission Act. Respondent denied that its advertising contained false representations, and further filed a plea of "*res judicata*" based upon the ground that prior to the institution of the complaint by the Commission, the United States had seized a shipment of the product of respondent, and had filed a libel proceeding, charging that the product was misbranded in violation of the Federal Food and Drugs Act, and that after a trial of said libel, the United States District Court for the Western District of Missouri had dismissed the Government's complaint upon a finding that the product was not misbranded.

The Commission disagreed with the findings of fact of the court in the libel proceeding, holding that the product was misbranded and, accordingly, rendered a cease and desist order. The Circuit Court of Appeals

for the Eighth Circuit, passing solely upon the plea of "*res judicata*", said:

> "Where the underlying issue in two suits is the same, the adjudication of the issue in the first suit is determinative of the same issue in the second suit. * * * The United States may not relitigate the same issue in successive libel proceedings involving different quantities of the same product, nor may it relitigate the same issue in any proceeding in which the parties are the same and the product is the same. The rule is 'that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.' * * *
>
> "Unless a question which a court or an administrative board has power to decide is to be regarded as conclusively settled as between the parties by the final decree of the court or the final order of the board, there can be no end to a controversy except as the result of the financial disability of one of the parties. If the question of the falsity of the representations of the petitioner contained on its labels and circulars had been determined adversely to the petitioner in the libel proceeding, it could not have been heard to say in the proceedings instituted by the Commission that such representations were true. By the same token, the United States and its instrumentality, the Commission, were not, after the decree in the libel proceeding, entitled to say that the representations made by the petitioner which had been finally adjudged not to be false, were in fact false. **The government had had its full day in**

> **court on that issue, had lost its case, and could not collaterally attack, either directly or indirectly, the decree entered against it."** (Emphasis supplied)

In the case of *Proper v. John Bene & Sons, Inc., et al.*, 295 F. 729, the question was raised as to whether the plea of "*res judicata*" was applicable to the findings and order of the Federal Trade Commission. The court in an opinion by Garvin, District Judge, held that a Federal Trade Commission order was not a final judgment, therefore, the plea of "*res judicata*" was not available, and in so holding said:

> "The result of the proceedings before the Commission is an order which has no effect in itself, unless made operative by the Circuit Court of Appeals, which has power of review. The doctrine of *res adjudicata* has no application unless a final judgment is involved."

The decision in the foregoing case was an interpretation of the Federal Trade Commission Act as originally enacted, which provided no time limit for an aggrieved party to seek judicial review. The Federal Trade Commission Act as amended provides that an order of the Federal Trade Commission shall be final at the expiration of 60 days if no appeal is taken.

The question as to the availability of the plea of "*res judicata*" was again raised after the amendment of the Federal Trade Commission Act in the case of *United States v. Willard Tablet Co.*, 141 F. 2d 141. The court in an opinion by Major, Circuit Judge, held that since the findings and order of the Commission became final upon the expiration of 60 days under the Federal Trade Commission Act, as amended, the doctrine of "*res*

judicata" and its availability applies to a Federal Trade Commission proceeding with the same effect as it applies to any other judicial determination. In so holding, the court said:

> "We must, therefore, uphold the decision of the lower court that the issues of fact tried by the Commission have a finality upon which *res judicata* may be predicated."

A few of the many cases discussing the principle of "*res judicata*" are the following:

In the case of *Southern Pacific R. R. Co. v. United States*, 168 U.S. 1; this Court, in an opinion by Mr. Justice Harlan, said at page 377:

> "The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters

properly put in issue and actually determined by them."

In the case of *Hemperly v. George Sliman & Co.*, 175 So. 767 (La.), the court said at page 768:

> "It was because of the fact that the judgment made no mention of the claim for damages set up by intervener in his opposition that we held the judgment, by its silence on this claim, rejected the same, and therefore served as the basis for the plea of *res adjudicata* in this second suit for damages arising out of the same alleged illegal seizure."

In the case of *Hunter v. Delta Realty Co.*, 169 S.W. 2d 936 (Supreme Court of Missouri) the court said at page 940:

> " * * * It is immaterial that the judgment did not expressly find against appellant on his claim for rents and profits accruing after judgment and pending delivery of possession pursuant thereto, because the effect of the judgment was to deny appellant's claim for such accruing rents and profits. *Young v. Byrd*, 124 Mo. 590, 597, 28 S.W. 83, 46 Am. St. Rep. 461; *Scheppelmann v. Fuerth*, 87 Mo. 351, 353. 'The legal effect of the silence of a judgment on any part of a demand that might have been allowed under the pleadings is a rejection of such part of the demand, which has the effect of *res adjudicata* against a subsequent action for that part.' 34 C.J. 818, § 1235."

In the case of *Fidelity & Deposit Co. v. Citizens Nat. Bank*, 120 S.W. 2d 113 (Court of Civil Appeals, Texas) the court said at page 116:

> "In *Rackley v. Fowlkes*, 89 Tex. 613, 36 S.W. 77, the Supreme Court said (page 78): 'The

proposition seems to be sound in principle and well supported by authority that where the pleadings and judgment in evidence show that the pleadings upon which the trial was had put in issue plaintiff's right to recover upon two causes of action, and the judgment awards him a recovery upon one, but is silent as to the other, such judgment is *prima facie* an adjudication that he was not entitled to recover upon such other cause.'"

In the case of *Board of Com'rs. for Buras Levee Dist. v. Cockrell*, 91 F. 2d 412, the court said at page 416:

> "Furthermore, 'The silence of the judgment on any demand which was an issue in the case under the pleadings must be considered as an absolute rejection of the demand.' *Villars v. Faivre*, 36 La. Ann. 398; *Soniat v. Whitmer*, 141 La. 235, 240, 74 So. 916; *Edenborn v. Blacksher*, 148 La. 296, 305, 86 So. 817."

In the case of *United States v. Interstate Commerce Commission*, 8 F. 2d 905, the court said at page 906:

> "It is said by the appellant that the question of certiorari was not given serious consideration, either by the court or counsel, in the former proceedings. This, however, does not alter the situation, for the question was expressly raised in the case, and it was not reserved out of the judgment. It must therefore be considered as adjudicated therein."

In the case of *Hockman v. Mortgage Finance Corporation of Pennsylvania, et al.*, 137 Atl. 252 (Supreme Court Pa.) the court said at page 253:

> "It is a general principle of public policy, making for the general welfare, for the certainty of individual rights, and for the dignity and respect of judicial proceedings, that the doctrine of

res adjudicata should be supported, maintained, and applied in proper cases. Nor should its application be restricted by technical requirements, but a broad view should be taken of the subject, having always in mind the actual purpose to be attained. The rule should not be defeated by minor differences of form, parties, or allegations, when these are contrived only to obscure the real purpose—a second trial on the same cause between the same parties. The thing which the court will consider is whether the ultimate and controlling issues have been decided in a prior proceeding in which the present parties actually had an opportunity to appear and assert their rights. If this be the fact, then the matter ought not to be litigated again, nor should the parties, by a shuffling of plaintiffs on the record, or by change in the character of the relief sought, be permitted to nullify the rule. This is a unversal rule, and is well stated by our present Chief Justice in *State Hospital v. Consolidated Water Co.*, 267 Pa. 29, 37, 110 A. 281. The requirements for application of the rule are that there be an identity of parties and of subject-matter in the two actions. The first of these requirements being present, all issues that were actually adjudicated in the former action are concluded (Bowers' Estate, 240 Pa. 388, 87 A. 711; *First Nat. Bank of Wrightsville v. Dissinger*, 266 Pa. 349, 109 A. 626); and, if the whole cause of action in the second case is the same as in the first, **not only the issues actually adjudicated in the first proceeding, but also those which might have been raised and passed upon, are concluded.** If, then, the issues in the present case could have entered into the determination of the first case, they should have been presented; and, if they were omitted for any cause, the judgment or decree entered thereon is conclusive between the parties or their privies. See *Morrett v. Fire Ass'n.*, 265 Pa. 9, 12, 13, 108 A. 171." (Emphasis supplied)

In the former complaint brought by the Commission under Docket 4736, the Commission sought to obtain a cease and desist order:

> (a) to prevent M.P.A. from conspiring, combining, cooperating or entering into agreements with each other to fix advertising rates on the ground that this was an illegal restraint of trade; and
>
> (b) to prevent M.P.A. from **individually** entering into contracts for periods of one to five years with motion picture exhibitors for the exclusive privilege of exhibiting advertising motion picture films, on the ground that exclusive contracts constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

In the present complaint, No. 5498, the Commission again seeks to obtain a cease and desist order to prevent M.P.A. from **individually** entering into contracts for periods of one to five years with motion picture exhibitors for the exclusive privilege of exhibiting advertising motion picture films, on the ground that exclusive contracts constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act. This is the sole issue now presented, and is exactly the same as one of the two issues presented in the former complaint.

Not only do the pleadings in the former case show that the sole issue now presented was presented in the former complaint, but this is also borne out by the fact that Mr. Haycraft, counsel for the commission, in his brief recommended that the cease and desist order include a prohibition forbidding M.P.A. from individually entering into exclusive theatre screening agreements; and, while M.P.A. contended that such an order should

not be granted, no contention was made that this was not an issue in the case. On the contrary, both sides admitted that it was an issue.

After a full consideration of the matter, the Commission refused to grant this part of the relief asked, and limited the prohibition to the entering into of contracts with motion picture exhibitors for the exclusive privilege of exhibiting national advertsing by means of commercial motion picture films in theatres, **only in case said exclusive contracts were entered into as a result of a combination, conspiracy, or common course of action between or among any two or more of said respondents, or between any one or more of said respondents and others not parties thereto.**

The Commission, having failed to obtain the full relief asked in the former complaint, now desires to retry one of the issues, and to obtain here the very relief which was denied in the former case.

It is to be borne in mind that there is no charge in the present complaint that M.P.A. has in any way changed its method of doing business, or the form or duration of its exclusive theatre screening agreements. All that is contended is that the present contracts, which contain the same provisions as the contracts referred to in the former complaint, constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act. That very issue was presented in the former complaint. The parties involved are the same. The facts are the same.

The Government has had its full day in court on that issue and cannot re-try it now.

The fact that the decision and order in the former case did not set forth the reason for denying the relief

asked by Mr. Haycraft is immaterial, since **under the pleadings and stipulation of facts** the Commission could have included in its former order a prohibition against M.P.A. individually entering into exclusive theatre screening agreements. The silence of the former order on this point, coupled with Mr. Haycraft's statement that the Commission would not grant the full relief recommended by him, requires the application of the doctrine of "*res judicata*", just as though the former order, in so many words, rejected this part of the Commission's demand.

The general rule of law on this point is summarized in 50 C.J.S., page 102, Section 656, which states:

> "The legal effect of the silence of a judgment on any part of a demand that might have been allowed under the pleadings is a rejection of such part of the demand, which has the effect of *res judicata* against a subsequent action for that part, unless it reasonably appears that the parties themselves, and the court, did not consider the issues concluded."

The Commission contends that the issue of whether M.P.A. has the legal right, individually, to enter into exclusive theatre screening agreements was not decided in the former proceeding, arguing that the issue in the former proceeding was limited by the pleadings to the right of the respondents named in that proceeding to enter into exclusive theatre screening agreements as part of a common understanding, agreement, combination, or conspiracy between or among two or more of the respondent companies. M.P.A. contends that the complaint in the former proceeding did put this question at issue, but even if it should be concluded that the present issue was not raised by the former pleadings, nevertheless, the

issue was, with the consent of both parties, tried, considered and resolved against the Commission and, therefore, is now "*res judicata*".

The cases hereinafter referred to clearly demonstrate that the issues in a proceeding before the Federal Trade Commission are to be determined not only by the allegations of the complaint, but also by considering questions actually litigated and considered during the course of the proceeding.

In the case of *New York Cent. & H. R. R. Co., et al. v. Interstate Commerce Commission*, 168 F. 131, there was an application by the complainant railroads for an injunction restraining the Interstate Commerce Commission from enforcing an order against them which had been entered in a proceeding instituted by a milling company requesting the Commission to fix rates upon wheat and other grains. The railroads contended that the order fixing the rates was invalid because it went beyond the issues raised in the proceeding instituted by the milling company, wherein they were defendants. The milling company in the prior proceeding specifically asked the Commission to fix the rate upon grain which it shipped from Chicago points to New York Harbor at the same amount as was fixed upon export grain. The Commission did not grant this relief, but instead gave the milling company the benefit of the rate upon flour milled in transit and exported. It was because of this variance between the issues raised by the pleadings in the former proceeding and the order entered in the former proceeding that the railroads sought the injunction.

In overruling the railroads' contention, the Court in an opinion by Noyes, C. J., said at pages 138-139:

"* * * If this order were a judgment of a

court, we should without hesitation say that the facts alleged in the petition did not support it. The Interstate Commerce Commission is, however, an administrative tribunal dealing with practical problems. So long as parties affected by its orders appear and are fully heard, we think it would be most unfortunate to deny its power to grant such relief as the facts shown upon the investigation should call for, even though such facts might be presented by evidence technically outside the issues raised. Notwithstanding, therefore, that the commission has established rules of practice analogous to those in courts, notwithstanding that its rules even provide that hearings shall be had upon issues joined, we are of the opinion that the strict rules of pleading should not be held applicable to it. Before we declare an order of the commission invalid as being outside the issues, we think that we should be satisfied that it is outside the issues actually presented to the commission and upon which the parties were heard. We have, therefore, thought it our duty to examine the evidence and consider the claims of the parties made upon the hearing before the commission. Through such examination we find that the milling company and the carriers appeared before the commission, and that the various phases of the discriminations claimed to exist against the milling company were fully inquired into, including that claimed to exist in favor of interior millers enjoying the milling in transit privilege. **As the hearing progressed, its scope apparently widened, and at its conclusion we are satisfied that the real question before the commission in the minds of all the parties was whether it was proper and practicable to afford relief like that granted by the order."** (Emphasis supplied)

In the case of *Fleming, Administrator of Wage and Hour Division, United States Department of Labor v.*

Miller, et al., 47 F. Supp. 1004, an action was brought to enforce the Fair Labor Standards Act, and the defendants contended that the decree should be vacated, suspended or modified, because it went beyond the issues raised by the pleadings. In answer to defendants' argument the Court, in an opinion by Joyce, D. J., said at page 1007:

> "* * * The rule seems sound in view of the doctrine that parties may litigate by consent issues not raised by the pleadings if the court has jurisdiction over the subject matter."

In *Paine & Williams Co. v. Baldwin Rubber Co.*, 113 F. 2d 840, a patent infringement action was brought by the plaintiff against the defendant and from a judgment dismissing the bill of complaint the plaintiff appeals. The defendant was the licensee of the plaintiff and the issue of infringement was held by the lower court to be "*res judicata*" because of a judgment in a suit at law between the same parties based upon the license agreement. The Court, in an opinion by Allen, C. J., in upholding the lower court's ruling on the plea of "*res judicata*", said at page 843:

> "* * * An issue is a single, certain and material point arising out of the allegations and contentions of the parties. The issue may normally be ascertained by an inspection of the pleadings. **In the freer modern practice, an issue sometimes arises from the affirmation on one side and the denial on the other of some material point of law or fact as developed by the evidence, though not presented by the pleadings.**" (Emphasis supplied)

In *Thomson v. Leak*, 135 C.A. 544, 27 P. 2d 795, it was said:

"* * * Further still, a finding may be made without the framed issues if the case was tried upon any theory which would support the finding."

In *Shelley v. Board of Trade of San Francisco, et al.*, 87 C.A. 344, 262 P. 403, the Court, in quoting from a prior decision said:

"In *Crescent Lumber Co. v. Larson*, 166 Cal. 168, 171, 135 P. 502, 503, the court says:

"'The rule just stated (referring to the fact that a finding outside the issue must be disregarded) is subject to the qualification that a finding may be considered where the issue, though not formally raised by the pleadings, was tried in the court below without objection.'"

In furtherance of the well-settled principle that the doctrine of "*res judicata*" should receive a liberal construction and should be applied without technical restrictions, it is said in *2 Black on Judgments, section 614*:

"The doctrine of *res adjudicata* does not rest upon the fact that a particular proposition has been affirmed and denied in the pleadings, but upon the fact that it has been fully and fairly investigated and tried; that the parties have had an adequate opportunity to say and prove all that they can in relation to it; that the minds of court and jury have been brought to bear upon it, and so it has been solemnly and finally adjudicated. * * * **For these reasons, the more correct doctrine is that the estoppel covers the point which was actually litigated and which actually determined the verdict or finding, whether it was statedly and technically in issue or not.**" (Emphasis supplied)

If the Commission in the prior proceeding had included within its cease and desist order the prohibition

against respondents entering into individual exclusive screening agreements with motion picture theatres for the screening of motion picture advertising, irrespective of any conspiracy so to do; these respondents most certainly could never have contended that the Commission's order went beyond the issues tried and considered in that proceeding. Counsel for the respective respondents unanimously considered that that question was an issue in the prior proceeding. Likewise, counsel for the Commission most certainly concurred, otherwise he would not have recommended to the Commission a form of order which would have directed the respondent distributors to cease and desist from individually entering into exclusive contracts with motion picture theatres for the screening of motion picture advertising.

For the reasons above stated, we submit that the plea of "*res judicata*" should be sustained and the complaint dismissed.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the Court of Appeals should be affirmed on the grounds that exclusive theatre screening agreements for periods of one to five years are necessary for the operation of the motion picture advertising business, and that the individual soliciting and obtaining thereof by M.P.A. do not constitute an unfair method of competition in commerce within the intent and meaning of Section 5 (a) of the Federal Trade Commission Act, and that the prevention of such contracts is not in the interest of the public, because (a) they do not unduly restrain competition, and (b) they have not created, or tended to create, in M.P.A. a monopoly.

In the alternative, we respectfully submit that the

plea of "*res judicata*" should be sustained on the ground that the same issue between the same parties was decided in favor of M.P.A. in the matter entitled "*Screen Broadcast Corporation, et al.*", 36 F.T.C. 957-962.

Respectfully submitted,

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CERTIFICATE

I, the undersigned, do hereby certify that I have this day served copies of the above and foregoing brief for Motion Picture Advertising Service Company, Inc. on the Solicitor General of the United States, by depositing same in the United States Mail, postage prepaid, addressed to said Solicitor General at the post-office address of the Department of Justice, Washington, D. C.

New Orleans, Louisiana, November , 1952.

Charles Rosen